Smith v. The Abandoned Vessel Doc. 42

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION H-07-784**
	§	
THE ABANDONED VESSEL,	§	
In rem	§	
Defendant.	§	

AGREED PROTECTIVE ORDER

The parties to this civil action, Nathan Smith ("Smith") and Marie Sorenson ("Sorenson"), Intervenor, recognize that confidential information and documents may be produced or disclosed by a party or a non-party witness in this suit. Consequently, the parties jointly move the Court for entry of an ***Agreed Protective Order*** pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. The Court, having been advised by the parties that they agree to the entry of this ***Agreed Protective Order***, hereby ORDERS AS FOLLOWS:

1. The terms defined in this Section 1 and parenthetically elsewhere shall, throughout this ***Agreed Protective Order***, have the meanings provided. Defined terms may be used in the singular or plural.

1.1 *"Producing Party"* means a party to this litigation, or persons other than a party, including non-party witnesses, that produce *Confidential*

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Information or *Highly Confidential Information* in testimonial, documentary or other tangible or intangible form.

1.2 *"Receiving Party"* means the party receiving or requesting production of *Confidential Information* or *Highly Confidential Information* in testimonial, documentary or other tangible or intangible form.

1.3 "*Confidential Information*" means information (1) which the Producing Party believes in good faith to constitute confidential technical or commercial information of the Producing Party or the confidential technical or commercial information of some third party which the Producing Party has in its possession, whether any such information is recorded or embodied in any physical medium (*e.g.*, a document, information contained in a document, equipment, information stored or displayed in electronic, magnetic or other mediums, information revealed during testimony, information revealed in interrogatory answers, or information revealed in interrogatory answers, or information revealed in any other way); and (2) which is properly designated under this ***Agreed Protective Order*** as *Confidential Information* by the Producing Party.

1.4 "*Highly Confidential Information*" means information (1) which the Producing Party believes in good faith to constitute confidential technical or commercial information of the Producing Party or the confidential technical or commercial information of some third party which the Producing Party has in its possession, where that information is so competitively sensitive that producing the information justifies imposing the requirement on the opposite party that only the party's litigation counsel may review such information and that the party's testifying and consulting experts are subject to objection as specified herein, whether any such information is recorded or embodied in any physical medium (*i.e.* whether it is a document, information contained in a document, equipment, information stored or displayed in electronic, magnetic or other medium, information revealed during the taking of testimony, information revealed in interrogatory answers, or information revealed in any other way); and (2) which is properly designated under this ***Agreed Protective Order*** as *Highly Confidential Information* by the Producing Party. The parties contemplate that cost information, pricing information, profits, marketing strategies, processes, technologies, information with respect to market share, and highly confidential information concerning a party's contractors, suppliers and customers, may be designated by the parties as *Highly Confidential Information*.

1.5 "Litigation Documents" means all pleadings, motions, discovery responses, affidavits and related papers produced or exchanged in the course of this Civil Action or any settlement negotiations related to this action, and all transcripts of testimony given in depositions, in hearings, or at trial.

1.6 "Termination" means the dismissal of this Civil Action (whether through settlement or otherwise), or the entry of final judgment and expiration of all periods to appeal or seek judicial review of such judgment or dismissal.

2. All *Confidential Information* shall be used by the Receiving Party solely for the purposes of this Civil Action and shall not, directly or indirectly, in whole or in part, be revealed, disclosed, or made available for inspection and copying to any individual or entity, except:

2.1 the Court and its personnel and any Jury impaneled in this action;

2.2 court reporters, videographers, and outside translators while present at a deposition, hearing, or trial in this Action;

2.3 the Receiving Party's outside attorneys retained by or for the Receiving Party and the support staffs of those attorneys (including law clerks, legal assistants, secretaries, clerks, and copying service personnel who provide copying and related litigation services at the request of the outside attorneys) assisting in discovery or in the preparation or trial of this action;

2.4 employees of the Receiving Party or other individuals representing the Receiving Party who have a need to know the *Confidential Information* in connection with maintaining or defending this Action and who have executed this Agreement or an agreement in the form of that attached hereto as Exhibit A before receiving *Confidential Information*;

2.5 any testifying or consulting expert who has executed an agreement in the form of that attached hereto as Exhibit A before receiving *Confidential Information*;

2.6 deposition witnesses and other testifying witnesses that have executed an agreement in the form of that attached hereto as Exhibit A before receiving *Confidential Information*; and

2.7 any other person authorized by written agreement of the parties or by order of the Court to receive *Confidential Information*.

3. All *Highly Confidential Information* shall be used by the Receiving Party solely for the purposes of this Civil Action and shall not, directly or indirectly, in whole or in part, be revealed, disclosed, or made available for inspection and copying to any individual or entity, except:

3.1 the Court and its personnel and any Jury impaneled in this action;

3.2 court reporters, videographers, and outside translators while present at a deposition, hearing, or trial in this Action;

3.3 the Receiving Party's outside attorneys retained by or for the Receiving Party and the support staffs of those attorneys (including law clerks, legal assistants, secretaries, clerks, and copying service personnel who provide copying and related litigation services at the request of the outside attorneys) assisting in discovery or in the preparation of this action for trial;

3.4 a Receiving Party's testifying and/or consulting experts who are not employees of the Receiving Party, who have been identified by a party in accordance with the procedures of Section 12 and/or Section 13, and who execute an agreement in the form of that attached hereto as Exhibit A and provide a copy of that signed agreement to the Producing Party (the *Highly Confidential Information* shall be revealed to such experts only if the Producing Party has not objected to the expert as required by Section 12, if the Producing Party has objected to such expert, all objections have been resolved pursuant to the requirements of Section 12, or, as to consulting only experts, Section 13 has been complied with);

3.5 deposition witnesses and other testifying witnesses that have executed an agreement in the form of that attached hereto as Exhibit A before receiving *Highly Confidential Information*, subject to the Producing Party's approval; and

3.6 any other person authorized by written agreement of the parties or by order of the Court to receive *Highly Confidential Information*.

4. If a Receiving Party believes that it has a need to disclose *Highly Confidential Information* to additional employees, consultants who have a continuing relationship with the Receiving Party, or in-house attorneys in order to maintain or defend this Action, then the Receiving Party shall contact the Producing Party and request authorization to disclose *Highly Confidential Information* to those additional individuals. In the event the parties are not able to reach agreement on the issue, the issue shall be submitted to the Court for resolution;

5. No person, other than the individuals described in Sections 2 or 3, shall be permitted to attend any deposition during disclosure of *Confidential Information*, unless the parties agree or the Court orders otherwise.

6. No person, other than the individuals described in Section 3, shall be permitted to attend any deposition, hearing or trial during disclosure of *Highly Confidential Information*, unless the parties agree or the Court orders otherwise.

7. A Producing Party shall designate *Confidential Information* or *Highly Confidential Information* contained in a document by conspicuously marking the

document as "Confidential Information" or "Highly Confidential Information," as the case may be, on the first page of the document and thereafter on each interior page containing or disclosing *Confidential Information* or *Highly Confidential Information*.

8. A Producing Party shall designate *Confidential Information* or *Highly Confidential Information* contained or embodied in a thing by conspicuously marking, when practicable, the thing as "Confidential Information" or "Highly Confidential Information," as the case may be, and by providing the Receiving Party with a written list describing those portions or aspects of the thing (including the whole) that contain or disclose *Confidential Information* or *Highly Confidential Information*.

9. A Producing Party may designate *Confidential Information* or *Highly Confidential Information* disclosed during a deposition or hearing by:

9.1 indicating on the record at the deposition or hearing the specific part of the testimony (including the entire testimony given or to be given by a witness) and all or any part of any document or thing marked for identification that is *Confidential Information* or *Highly Confidential Information* and subject to the provisions of this ***Agreed Protective Order***; or

9.2 notifying all Receiving Parties within thirty (30) day from the time the Producing Party receives a deposition or hearing transcript that the transcript contains *Confidential Information* or *Highly Confidential Information* and specifically identifying those portions (including a witness's entire testimony) that contain *Confidential Information* or *Highly Confidential Information*. The Receiving Party shall not be in breach of this ***Agreed Protective Order*** for any disclosure made prior to receipt of such notice where that disclosure otherwise would have been authorized by this Order but for the subsequent designation.

10. A Receiving Party is not obligated to challenge the propriety of a designation of *Confidential Information* or *Highly Confidential Information* at the time such designation is made, and any failure to do so will not waive the party's right to request the Court to determine the propriety of the designation at any time. Should a Receiving Party challenge a Producing Party's designation, the parties agree to attempt to resolve the dispute in good faith. If the dispute cannot be resolved, and the Receiving Party seeks relief from the Court, the Producing Party will bear the burden of proving the propriety of its designation.

11. In the event a Producing Party inadvertently fails to designate *Confidential Information* or *Highly Confidential Information* when it is produced or disclosed, that party may, at any time thereafter, designate the *Confidential Information* or *Highly Confidential Information* by appropriate written notice to

the Receiving Party's counsel. The Receiving Party shall not be in breach of this ***Agreed Protective Order*** for any disclosure made prior to receipt of such notice which would otherwise have been authorized by this Order but for the subsequent designation.

12. Prior to providing *Highly Confidential Information* of any Producing Party to a testifying or consulting expert who does not have a continuing relationship with the Receiving Party, the Receiving Party shall notify the Producing Party as to the identity of that testifying or consulting expert and shall provide the Producing Party a copy of the testifying or consulting expert's *curriculum vitae* and a list of the companies for which the expert has worked or consulted for within the preceding two (2) years. The Producing Party shall serve the Receiving Party with written objections to the testifying or consulting expert within ten (10) business days after receiving the notice. If no written objection is timely served, the Receiving Party may provide *Highly Confidential Information* to the testifying or consulting expert according to the terms of this *Protective Order*. If the Producing Party timely serves its objections, the Receiving Party shall not provide *Highly Confidential Information* to the testifying or consulting expert until all objections are resolved. The parties shall work together in good faith to resolve any timely served objections concerning the testifying or consulting expert. If any such dispute cannot be resolved, it shall be submitted to

the Court on an expedited basis.

13. Prior to providing *Highly Confidential Information* of any Producing Party to a consulting only expert, the Receiving Party shall obtain from such consulting only expert an executed agreement in the form of that attached hereto as Exhibit A, and shall notify the Producing Party, in writing, that *Highly Confidential Information* is to be provided to such consulting expert, who has executed an agreement in the form of that attached hereto as Exhibit A. The Receiving Party shall maintain a copy of each such executed agreement. The parties shall work together in good faith to resolve any issues concerning consulting expert. If any such dispute cannot be resolved, it shall be submitted to the Court on an expedited basis.

14. Any party may move the Court to amend this ***Agreed Protective Order*** on 15 business days' notice to all parties to this Action and the Producing Party that produced the information in question (or such shorter notice as the Court may require). In any proceedings on such a motion, the prior existence of this ***Agreed Protective Order*** shall not affect the burden of persuasion that would rest upon any proponent of a protective provision. The Court, on its own motion, may amend this ***Agreed Protective Order***.

15. Nothing in this ***Agreed Protective Order*** shall bar or otherwise restrict any attorney from rendering legal advice this or her client with respect to

this litigation and referring generally to *Confidential Information* or *Highly Confidential Information* or relying upon the attorney's own examination of *Confidential Information* or *Highly Confidential Information*.

16. If any Receiving Party is required by law to disclose some portion of the *Confidential Information* or *Highly Confidential Information* other than ordinarily permitted by this ***Agreed Protective Order***.

16.1 The Receiving Party will inform the Producing Party who originally disclosed such *Confidential Information* or *Highly Confidential Information* of the requirement as soon as practicable after receiving notice of the requirement. The Receiving Party will further inform the Producing Party which *Confidential Information* or *Highly Confidential Information* it is required to disclose.

16.2 The Receiving Party shall inform the requiring entity of the Receiving Party's obligations set forth in this ***Agreed Protective Order***.

16.3 The Producing Party may seek a Protective Order with confidentiality provisions identical to this ***Agreed Protective Order***. The Receiving Party shall not oppose the Producing Party's attempts to obtain the Protective Order in any fashion, including assisting any third party in opposing the entry of such Protective Order.

16.3.1 If the Producing Party elects to seek a protective order under the above section 16.3, it shall notify the Receiving Party within twenty (20) days after the Receiving Party sends its notice.

16.3.2 If the Producing Party elects not to seek a protective order, or if the Receiving Party receives no notice under the above section 16.3.1 within twenty (20) days, the Receiving Party shall have the right to disclose the required *Confidential Information* or *Highly Confidential Information*.

16.3.3 If the Producing Party is unable to obtain a protective order satisfactory to the Producing Party after exhausting all applications for writs of mandamus and all interlocutory appeals from the denial of such a protective order, the Receiving Party shall have the right to disclose the required *Confidential Information* or *Highly Confidential Information,* provided however, that the Receiving Party shall have the right to disclose only to the extent of the protective order that is obtained.

17. The restrictions of the ***Agreed Protective Order*** shall not apply to, and this Order shall not be construed to prevent, any Receiving Party from making use of or disclosing information that:

17.1 was lawfully in its possession prior to receipt of such information from a Producing Party, as shown by its written records dated prior to the Producing Party's disclosure;

17.2 appears in any issued patent, prosecution history, or other published material available to the Producing Party's trade or business, available to the public, or otherwise becomes available within the public domain, other than as a consequence of the Receiving Party's breach of any obligation not to disclose the information; or

17.3 it lawfully obtains subsequent to the Producing Party's disclosure, without obligation of confidence, from a source or sources other than the Producing Party;

regardless of whether the same has been designated as *Confidential Information* or *Highly Confidential Information.*

17.4 Information shall not be deemed to be in the Receiving Party's possession; in an issued patent, a prosecution history, or other published material; or in the public domain merely because such information may be embraced by more general disclosures or derived from combinations of separate disclosures that are in the Receiving Party's possession, in an issued patent, in a prosecution history, in other published material or in the public domain.

18. This ***Agreed Protective Order*** shall not be construed as a waiver by the parties of any objection which might be raised as to the admissibility of any

evidence. This ***Agreed Protective Order*** shall be without prejudice to the rights of any person to oppose production of any information on any proper ground.

19. All Litigation Documents filed with the Court and designated by either party as containing *Highly Confidential Information* or referring to any previously designated *Highly Confidential Information* shall be marked as containing *Highly Confidential Information*." The party filing any such Litigation Document shall move the Court to file the document under seal.

20. Except as filed with the Court in accordance with this Order, all documents and things designated as *Confidential Information* or *Highly Confidential Information* shall be maintained at all times in the custody of individuals described in Sections 2, 3 or 4, respectively. Within 60 days after Termination of this action, the original and all copies of each document and thing produced to a Receiving Party, or given to any other person pursuant to this ***Agreed Protective Order***, which contains *Confidential Information* or *Highly Confidential Information* shall be destroyed. Upon its completion, counsel for the Receiving Party shall promptly certify the destruction in writing to the Producing Party.

21. Insofar as its provisions restrict the use or disclosure of any *Confidential Information* or *Highly Confidential Information*, this ***Agreed Protective Order*** shall remain binding after Termination of this Action, and the

Court shall retain jurisdiction of all persons and parties bound by this ***Agreed Protective Order***.

22. Nothing in this Order shall affect the admissibility into evidence of *Confidential Information* or *Highly Confidential Information*.

23. The intentional production or disclosure of any document subject to, or allegedly subject to, claim of attorney/client or work product privilege or immunity, or any other privilege or immunity from discovery, shall constitute a waiver only as to that document, and shall not constitute a general waiver of any privilege or immunity from discovery as to any other information or document relating thereto or in the same or related subject matter.

The inadvertent disclosure of any document, which is subject to a legitimate claim that the document should have been withheld from disclosure as a privileged attorney/client communication or attorney work product, shall not constitute a waiver of any privilege or otherwise affect the right to withhold from production as privileged or as a work product any other documents or information, even though such documents or information may relate to the same or a related transaction or subject matter as the document inadvertently disclosed. Upon a request made in good faith on or before thirty (30) days after learning that a document has been inadvertently produced, any such document shall be returned to the Producing Party upon request, together with all derivatives of any such document. The privilege or work product status of such document or information shall be deemed to be restored upon the making of such request, provided, however:

1. Nothing herein shall preclude the Receiving Party from requesting the Court to determine whether a document or information is privileged or is work product information. In the event that the Receiving Party intends to challenge the claim of privilege, the Receiving Party may retain a copy of such document for such purpose.

2. If the Producing Party either (i) expresses the intent to use such document or information at a hearing, deposition or trial, or (ii) uses such document or information at a hearing, deposition or trial, the Producing Party's right to request return of such document or information shall be foreclosed.

3. If Receiving Party gives notice of such party's intent to use a document or information at a hearing, deposition or trial, the Producing Party may request the return of such document or information, if inadvertently disclosed, within seventy-two (72) hours of such notice, and in any event prior to commencement of such hearing, deposition or trial.

Signed this _______ day of ________________________, 2008, in Houston, Harris County, Texas.

____
UNITED STATES DISTRICT JUDGE

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AGREED TO BY:

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EXHIBIT A

I, the undersigned, have reviewed the attached Agreed Protective Order entered in the case styled *Nathan Smith v. The Abandoned Vessel, et al.*, Civil Action No. H-07-784 in the United States District Court for the Southern District of Texas (the "Agreed Protective Order"), and I acknowledge its terms. Having been advised to seek my own counsel before doing so, I agree to be bound by the terms of the Agreed Protective Order.

Signed this ______ day of ____________________________, 2008.

____
Name:

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